IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 22ND FEBRUARY 2007 / 3RD PHALGUNA 1928

SA.No. 436 of 1996(B)

AS.76/1988 of SUB COURT, CHERTHALA
OS.265/1984 of PRL.MUNSIFF COURT, CHERTHALA

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APPELLANT:/1st RESPONDENT/PLAINTIFF

GOPINATHAN, S/O.PADMANABHAN, RESIDING AT
DHARMAVILASATH FROM KANATTUSSERIL, UZHUVA MURI,
VAYALAR MEKKU VILLAGE.

BY ADV. SRI.V.GIRI

RESPONDENTS: APPELLANT & RESPONDENTS 2 TO 4 /DEFENDANTS 1 TO 4

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1. PANKAJAKSHY AMMA, RESIDING AT DHARMAVILASATH FROM KONATTUSSERIL, UZHUVA MURI, VAYALAR MEKKU VILLAGE (DIED. LRS RECORDED.)

ADDL.R2:- VIJAYAMBIKA, VAVAKATTU VEEDU,
VAYALAR EAST P.O. ETUPURACKAL.

R3:- AJAYAGHOSH, ALSO CALLED AS BABY, DO. DO. DO.

R4:- JAYANTHAMMA, DO. DO. DO.

(APPELLANT AND R2 TO R4 ARE RECORDED AS THE L.RS OF DECEASED R1 AS PER ORDER DT.14.1.04 ON I.A.NO.2/04.)

BY ADV. SRI.SAIGI JACOB
SRI. K.M.JOSEPH FOR R1 TO R4

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 22 /2/07 THE COURT ON 22/02/2007 DELIVERED THE FOLLOWING:

ORDER ON C.M.P.No.1561/1996 IN S.A.NO.436/1996

22/2/07 DISMISSED SD/- M.SASIDHARAN NAMBIAR
JUDGE

true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.436 OF 1996

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Dated this the 22nd day of February, 2007

JUDGMENT

The plaintiff in O.S.265/84 on the file of Munsiff Court, Shertallai is the appellant. Respondents are the defendants. First respondent is the mother and appellant is her son in her first marriage with Padmanabhan and respondents 2 to 6 are the children born to first respondent in her second marriage. Appellant instituted the suit seeking a decree for fixation of boundary and for permanent prohibitory injunction. Item No.2 is the building in item No.1. Item No.1 and 4 are properties originally belonged to appellant and respondents. According to appellant, under Ext.A3 partition deed of 1963 the co-ownership properties were divided and item No.1 was allotted to appellant and item 4 of the plaint schedule property to respondents. Contending that item No.3 of the plaint schedule property originally belonged

to his maternal uncle and it was given by uncle to first respondent mother and she put appellant in possession of the property. It was contended that items 1 to 3 of plaint schedule properties are in the actual possession and enjoyment of appellant and respondents making use of their possession of item No.4 of plaint schedule properties attempted to trespass into the remaining properties and therefore it is necessary to fix the boundary of the properties. Appellant also sought a decree to restrain respondents from trespassing into item 1 to 3 of plaint schedule properties. Respondents in their written statement disputed the genuiness of Ext.A3 partition deed. It was contended that the partition deed was vitiated by undue influence exerted by appellant and the signature of first respondent was obtained misrepresenting that her signature is necessary for obtaining a loan. It was contended that partition deed is not valid and binding. It was also contended that subsequent to Ext.A3 partition deed, appellant along with

respondents executed Ext.B2 mortgage deed whereunder it was specifically recited that the partition deed did not come into effect. It was also contended that appellant is not in exclusive possession of item 1 to 3 of plaint schedule properties and therefore is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Exts to A1 to A26, B1 to B14, C1 to C4 and Pws. 1 and 2 and Dws.1 and 2 granted a decree in favour of appellant and the boundary of item 1 and 4 of plaint schedule properties were fixed as demarcated in Ext.C4 plan. A decree for injunction in respect of item 1 and 3 of plaint schedule properties was also granted. First respondent challenged the decree and judgment before Sub Court, Shertallai in A.s.76/88 contending that Ext.B2 establish that Ext.A3 did not come into effect and therefore learned Munsiff should not have granted the decree. Appellant filed a cross objection challenging the finding of the trial court that respondents have got right of

residence in item No.2 of the plaint schedule building situated in item No.1 of plaint schedule property. Learned Sub Judge on reappreciaiton of evidence found that though Ext.A3 partition deed was executed, from Ext.B2 jointly executed by appellant and respondents and Ext.A1 mortgage deed, it is clear that Ext.A3 partition deed did not come into effect and therefore appellant cannot claim any exclusive right over plaint schedule properties and set aside the decree granted by trial court and dismissed the suit. It is challenging the said judgment, Second Appeal is filed.

3. On the death of first respondent, appellant and respondents 2 to 4 were recorded as her legal heirs. Subsequent to the filing of the appeal respondents 2 to 4 assigned their right over item No.4 of plaint schedule properties in favour of appellant as per registered sale deed dated 30.7.06. In the sale deed they have specifically stated that the right assigned to the appellant is

the right obtained by them under Ext.A3 partition deed and their right is transferred to appellant after receiving the consideration of Rs.1,00,000/- and it was after recognising the rights of appellant under Ext.A3 partition deed. There is also a recital that they would file a compromise petition in the Second Appeal. When the appellant produced this registered document along with I.A.2724/06 to receive it as additional evidence stating that the matter has been settled, learned counsel appearing for respondents 2 to 4 reported no instructions stating that respondents did not furnish any instruction to him. The appeal was thereafter posted and no respondent or any other counsel appeared for them.

4. Learned counsel appearing for appellant was heard.

5. Though a decree for fixation of the boundary was sought for and was granted by the learned Munsiff, it was set aside by first appellate court and in the appeal the said decree

was sought to set aside for in view of the subsequent developments narrated earlier learned counsel appearing for appellant submitted that there is no necessity for a decree for fixation of the boundaries. Evidently fixation of boundaries was sought on the allegation that respondents to whom item No.4 of plaint schedule properties was allotted under Ext.A3 partition deed, are trying to trespass into the remaining property allotted to appellant and therefore it is necessary to fix the boundary separating the two properties. Under the registered sale deed executed by appellants and produced along with I.A.2724/06, rights of respondents 2 to 4 over item No.4 of plaint schedule properties was transferred to the appellant. Therefore there is no necessity to fix the boundary separating that property with other properties. As the document produced along with I.A.2724/06 is necessary to pronounce a better judgment, the application under Rule 27 of Order XL1 of Code of Civil Procedure is allowed and the

document is received as additional evidence and marked as Ext.A27.

6. The case of the appellant was that item No.1 of the plaint schedule properties belongs to him absolutely as it was allotted to him under Ext.A3 partition deed. The learned Munsiff accepting that case granted a decree. Learned Sub Judge set aside that finding holding that Ext.A3 partition deed did not come into effect. Under Ext.A27, respondents 2 to 4 admitted the rights of appellant over item No.1 of the plaint schedule property under Ext.A3 and also unambiguously stated that they are recognising the rights under Ext.A3 and transferred their right over item No.4 of the plaint schedule properties to the appellant to enjoy the said property along with item No.1 of the plaint schedule property. Therefore rights and possession of the appellant over item No.1 of the plaint schedule properties is now established and accepted by respondents 2 to 4 under Ext.A27. Item No.2 of the plaint schedule properties is the

building in item No.1 of the plaint schedule property. Ext.A3 partition deed shows that at the time of partition, the residential building where first respondent mother and children were residing is included in the 10 1/14 cents allotted to respondents. Therefore respondent cannot claim any right over any building in item No.1 of the plaint schedule properties. Therefore plaintiff has established his right and possession over item 1 and 2 of the plaint schedule properties. Therefore appellant is entitled to get a decree for injunction in respect of item No.1 and 2 of the plaint schedule properties.

7. But as against item No.3 of the plaint schedule properties, I find no reason to interfere with the finding of learned Sub Judge. Even according to appellant, item No.3 of the plaint schedule properties originally belonged to the mother, the first respondent. According to appellant, it was entrusted by first respondent to appellant. Appellant thus claims exclusive

possession of the said property. Learned counsel appearing for appellant argued that even if title has not been established, appellant is entitled to get a decree for injunction as possession was established. When the property admittedly belongs to grandmother and according to appellant it was entrusted to the mother, on the death of the mother respondents 2 to 4 also will inherit the property and they are co-owners of the property. If that be the case, appellant is not entitled to a decree for permanent prohibitory injunction against respondents 2 to 4 the other co-owners. Therefore appellant is not entitled to a decree for injunction restraining respondents 2 to 4 from trespassing intoitem No.3 of plaint schedule properties. It is made clear that the claim of title to item No.3 of plaint schedule property raised by appellant on the basis that there was an oral transfer of the property in favour of the mother and from the mother to the appellant is not decided in this appeal. The dismissal of the

claim for injunction will not disentitle appellant from seeking a decree on the strength of title, if title could be established.

Second appeal is therefore allowed in part. The judgment of learned Sub Judge in A.S.76/88 is set aside. O.S.265/84 stands decreed as follows:- Respondents 2 to 4 are restrained by a decree of permanent prohibitory injunction from trespassing into items 1 to 3 of plaint schedule properties. No costs.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006